89- 1664

NO. _____

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF NEW MEXICO,
Petitioner,

v.

TERRY CALLAWAY and MIKE C. MOLINAR
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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QUESTION PRESENTED

Does double jeopardy bar retrial of the defendants after the trial judge sua sponte declared a mistrial when a police officer testifying for the defense stated that he did not believe the rape victim, only minutes after the trial judge had ruled that this testimony was inadmissible and warned that if it came in he would declare a mistrial.

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IN THE

Supreme Court of the United States

October Term, 1990

STATE OF NEW MEXICO,
Petitioner,

v.

TERRY CALLAWAY and MIKE C. MOLINAR
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

The petitioner, State of New Mexico, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the New Mexico Supreme Court entered in *Callaway v. State* on January 25, 1990, and in *Molinar v. State* on February 27, 1990.

OPINIONS BELOW

The New Mexico Supreme Court's opinion in *Callaway v. State* is reported at 785 P.2d 1035. The New Mexico Supreme Court's opinion in *Molinar v. State* is reported at 787 P.2d 455. Both opinions are reprinted in Appendix A.

The New Mexico Court of Appeals' formal opinion in *Callaway* is not yet reported. The New Mexico Court of Appeals issued a memorandum opinion in *Molinar*. Both opinions are reprinted in Appendix B.

STATEMENT OF JURISDICTION

The New Mexico Supreme Court issued its opinion in *Callaway* on January 25, 1990.The state's timely motion for rehearing was denied on February 14, 1990.

The New Mexico Supreme Court issued its opinion in *Molinar* on February 27, 1990. The state did not file for rehearing.The defendant's motion for rehearing was denied on March 20, 1990.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a). This petition will be timely if filed on or before Monday, April 16, 1990.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V (Double Jeopardy Clause):

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

U.S. Const. amend. XIV (Due Process Clause):

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Terry Callaway and Mike Molinar were charged with kidnaping, aggravated battery, two counts of criminal sexual penetration in the second degree, criminal sexual contact, and conspiracy to commit criminal sexual penetration, in connection with the gang-rape of Tammy Lewis. The defendants were represented by the same counsel at their joint trial.

During the state's case Mrs. Lewis described a month-long history of threats and harassment by the defendants and an unidentified third man, culminating in her abduction and rape. The state's case relied almost entirely on Mrs. Lewis' credibility, because there was little physical evidence of the assault. The defense moved for mistrial three times during the state's case in chief, based on the allegedly prejudicial effect of various evidentiary rulings. The trial judge considered and denied each motion. See T1/6/459; T1/10/199 and 363; T1/10/423 and T1/11/512.

Callaway and Molinar claimed alibis; their theory of the case was that Mrs. Lewis had invented the harassment and rape. Before the defense presented its case, the state made a motion in limine to prevent the introduction of opinion testimony from two defense witnesses: State Police Officers Medina and Garcia. T1/17/71.[1] Mrs. Lewis had spoken to the officers before the rape about the harassment by the defendants. The state believed the defense intended to elicit the officers' testimony that they did not believe Mrs. Lewis' allegations of harassment. Defense counsel stated that he planned to ask Officer Medina for his professional

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1. The defendants were tried twice. Both trials were tape recorded. Citations indicate trial number, tape number, and counter number from a Lanier Model P.88/t transcriber.

opinion regarding Mrs. Lewis' veracity, but he was not sure he would solicit Officer Garcia's opinion. The court granted the state's motion, and instructed defense counsel not to ask either officer his opinion of the victim's veracity. Defense counsel said he would advise Officer Medina of the court's ruling. The trial judge warned counsel that he would declare a mistiral immediately if the officers gave their opinions.

Minutes after the judge granted the state's motion in limine, defense counsel called Officer Garcia to the stand without informing him of the judge's ruling. T1/18/174. During a series of redirect questions concerning Mrs. Lewis' account of the harassment, defense counsel asked the officer if he had done anything to dissuade Mrs. Lewis from filing a complaint. The officer responded, "No, sir. Not dissuade her from not filing a complaint. In fact, what I was telling her, to be real frank, I didn't believe her or what she was saying." T1/18/27. The judge immediately declared a mistrial.

After the jury left the courtroom, defense counsel denied soliciting the improper response, and claimed the answer was unexpected. T1/18/70. Counsel explained that he was trying to counter Mrs. Lewis' testimony that the officers tried to dissuade her from filing charges. T1/18/70.

The trial judge found otherwise. The judge went on record to say that he believed counsel had probed for just that improper response. T1/18/66. The record offers some support for the judge's belief, because the officer's only significant contribution to the defense was his opinion that the victim was a liar. The question was not necessary to counter Mrs. Lewis' testimony. She had testified that Sheriff Paine—not the state police officers—had advised her not to file charges because the defendants would "just get their hands slapped." T1/5/266. The judge noted that even if counsel had not intentionally solicited the remark, counsel at least

violated his duty to inform the officers that they were not to give their opinions. T1/18/157.

When the trial was re-scheduled, defense counsel moved to dismiss on double jeopardy grounds. U.S. Const. amends. V and XIV; N.M.Const.art.2, §15. RP 136-137. The court denied the motion. RP 206. The case proceeded to trial, and the defendants were convicted on all counts. The trial court sentenced each defendant to the basic term for each offense, and ordered that the terms be served consecutively, for a total of 34 and one-half years followed by two years of statutory parole. RP 305-306.

Callaway and Molinar filed separate appeals in the New Mexico Court of Appeals. Each argued that the double jeopardy clauses of the state and federal constitutions barred the second trial because the declaration of mistrial was not based on manifest necessity. Molinar Brief in Chief at 11-14; Callaway Brief in Chief at 7-14.

The New Mexico Court of Appeals affirmed the convictions in a split decision. The majority balanced the defendants' right to have their trial completed against the public's interest in a fair trial and just judgment, and concluded that the record contains sufficient justification for the trial court's declaration of the mistrial. The dissenting judge did not balance the competing interests. Instead, he focused on the lack of a record that the trial court considered alternatives to a mistrial, and the lack of a record that the defense attorney intentionally solicited the prejudicial testimony. Both the majority and the minority opinions cite *Arizona v. Washington*, 434 U.S. 497 (1978) to justify their conclusions regarding the sufficiency of the record below.

Callaway and Molinar filed separate petitions to the New Mexico Supreme Court for a writ of certiorari, raising the double jeopardy issue. The New Mexico Supreme Court, also in a split decision, reversed the convictions and ordered the trial court to

discharge the defendants from custody. The majority adopted and amplified the dissenting opinion from the court of appeals, and based its decision expressly on the Fifth Amendment of the United States Constitution. The dissenting justice adopted the majority opinion of the court of appeals as his dissent.

REASONS FOR GRANTING THE WRIT

1. THE NEW MEXICO SUPREME COURT FAILED TO APPLY THIS COURT'S TEST FOR DETERMINING WHETHER MANIFEST NECESSITY EXISTS FOR DECLARING A MISTRIAL.

Double jeopardy does not prevent retrial after a mistrial is declared on the basis of "manifest necessity." *United States v. Perez*, 9 Wheat. 579 (1824). Instead, the defendant's "valued right to have his trial completed by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington*, 434 U.S. 497, 503-505 (1978). *See Illinois v. Somerville*, 410 U.S. 458, 470 (1973). This Court has declined to provide a mechanical test for determining whether manifest necessity exists. *United States v. Jorn*, 400 U.S. 470, 480 (1971). But as the *Callaway* and *Molinar* case makes clear, the trial judge's decision is difficult, and the stakes are high. If the judge believes that the state's case has been seriously prejudiced, he must choose between proceeding with the trial to an unappealable and possibly unjust acquittal, or declaring a mistrial and risking reversal on appeal and the discharge of the defendants. In this case, the judge chose mistrial. The state believes that in rejecting that choice the New Mexico Supreme Court misapplied this Court's test for determining manifest necessity by ignoring the public interest in a fair and just result, by failing to correctly weigh the defendant's double jeopardy interests under the facts of the

case, and by applying the wrong standard of review. Review of the *Callaway* and *Molinar* decisions would offer this Court an opportunity to address unanswered questions regarding the review of mistrial decisions and provide much-needed guidance to the trial courts.

A. Review is necessary to clarify that it is the fairness of the trial, and not the conduct of the participants, that is central to the concept of manifest necessity.

At the core of the "manifest necessity" concept is the recognition that a mistrial declaration may be necessary to preserve the fairness of a trial. Consequently, where a jury is tainted, the declaration of a mistrial may be an appropriate response. *See discussion in Arizona v.Washington*, 434 U.S. at 512-513. Instead of asking whether the officer's improper testimony affected the fairness of the trial, the New Mexico Supreme Court asks whether the officer's improper testimony was the result of defense misconduct. After rejecting the trial court's conclusion that defense counsel was responsible for the introduction of improper testimony, the New Mexico Supreme Court concludes that the accidental introduction of testimony prejudicial to the state "should not redound to [defendant's] harm" by resulting in a mistrial. *Callaway v.State*,__ N.M.__785 P.2d 1035, (1990)(Baca, J. dissenting). By focusing on the defense counsel's intent, rather than on the effect of his conduct on the fairness of the trial, the New Mexico Supreme Court loses sight of what this court has identified as a fundamental purpose of the manifest necessity concept. A court does not declare a mistrial to punish defense counsel for misconduct; a court declares a mistrial to protect the integrity of the trial process. The harm to the state's case remains the same whether the improper testimony was introduced intentionally, negligently, or accidentally. Review of the *Callaway* and *Molinar* decisions by this Court is necessary to place the focus back where it belongs: on the fairness of the trial.

B. Review is necessary to guide trial court judges in weighing the defendant's double jeopardy interests.

This Court has identified the defendant's interest in having the jury already impaneled hear his case as the most important interest protected by the Double Jeopardy Clause. *See discussion in Jorn*, 400 U.S. at 484-485. To determine whether that interest is subordinate to the public's interest in a fair and just judgment, the court must be able to evaluate the importance of defendant's double jeopardy interests under the facts of the case. But this Court has not told trial judges how to make that evaluation. The *Callaway* and *Molinar* decisions give this Court an opportunity to decide two unresolved issues. First, to what extent must a court recognize a defendant's interest in having the jury already impaneled hear his case when that jury has been prejudiced in favor of the defense by the introduction of improper testimony? Second, to what extent must a court respect a defendant's interest in having the jury already impaneled hear his case when the defense has previously moved for mistrial in order to obtain retrial by a different jury?

The New Mexico Supreme Court found that a defendant should retain control over the mistrial decision even after the jury has been prejudiced in favor of the defense. The state recognizes that courts should be reluctant to foreclose the defendant's option to continue to verdict. *United States v. Jorn*, 400 U.S. 470 (1971). Even when the trial contains error harmful to the defense, the defendant may want to proceed with a jury he believes is favorably disposed to his case. In the absence of strong public policy concerns, his wishes should be respected. See *Cardin v. Sedita*, 53 A.D.2d 253, 385 N.Y.S.2d 667 (1976). But deference and control over the proceedings should not be given to a defendant who has injected the trial with prejudice to the state. The defendant has no protected interest in proceeding to an unjustified and unappealable acquittal.

The New Mexico Supreme Court refused to consider the fact that the defendants had moved for mistrial three times before they objected to the sua sponte declaration of a mistrial. The state does not argue that once a defendant moves for a mistrial he waives any objection to a later declaration of mistrial. The state does argue, however, that prior defense motions for mistrial are strong indicators that the defendant did not want the jury already impaneled to hear his case. The *Callaway* and *Molinar* cases provide a perfect example. When the defendants had to choose between proceeding to verdict with the jury they had, or seeking retrial by a new jury, they sought a new trial. When moving for a mistrial, the defendants argued that continuing with the current jury would be prejudicial to their case. T1/11/452; T1/11/199. After the court's sua sponte declaration of a mistrial, the issue changed to whether the defendants would be retried, or if the charges would have to be dismissed. Only when the opportunity for dismissal arose did the defendants express any concern for their double jeopardy interests. This Court should review the cases to determine the effect of prior defense motions for mistrial on the evaluation of manifest necessity.

C. Review is necessary because the New Mexico Supreme Court failed to apply the high degree of deference due a trial court's evaluation of the need for a mistrial where the conduct of the defense may have affected the partiality of the jury.

The New Mexico Supreme Court gives no deference to the trial judge's determination that a mistrial was required. The opinion therefore conflicts with decisions of this Court which hold that if the conduct of the defense may have affected the partiality of the jury, the trial court's evaluation of the need for a mistrial is accorded the highest degree of respect. *Arizona v. Washington*, 434 U.S. at 511.

This Court recognizes that compelling institutional considerations favor appellate deference to the trial court decision in these circumstances. Although the extent of possible juror bias cannot be measured, *id.* at 511, the trial judge is in the best position to evaluate how the conduct of the defense has affected the trial. The trial judge is familiar with the evidence and the background of the case, has heard the tone of the argument, and has observed the apparent effect of the conduct on the jurors. *Id.* at 514.

> Cases involving possible serious prejudice to the state create a dilemma for the trial judge. If he or she does not grant a mistrial, the prejudice could result in an unjust acquittal, and the state will have no recourse on appeal. If he or she does grant a mistrial, the case will be dismissed if an appellate court evaluates the manifest necessity differently. The trial court's power to make this difficult decision must therefore be broad:
>
> > The interest in orderly, impartial procedure would be impaired if he were deterrred from exercising that power by a concern that anytime a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred.
>
> *Id.* at 513.

By second-guessing the trial judge's evaluation of the case, the New Mexico Supreme Court takes the trial judge's discretion away, and with it, the judge's power to control his courtroom. The judge cannot use the threat of mistrial to enforce his orders. The real-world implication of the opinions below is that any defense attorney, for the price of risking contempt, can prejudice the case in his favor. It is a small price to pay. At a minimum, he will succeed in tainting the trial and increasing the defendant's chances for an unjust acquittal. At best, he may win the prize: declaration of a mistrial and a bar to retrial.

2. REVIEW OF THE NEW MEXICO SUPREME COURT OPINIONS BELOW WOULD RESOLVE THE CONFLICT BETWEEN THE MAJORITY AND THE DISSENT IN *ARIZONA V. WASHINGTON* REGARDING THE EXTENT TO WHICH THE TRIAL COURT MUST REVIEW THE ALTERNATIVES TO A MISTRIAL ON THE RECORD.

The New Mexico Supreme Court opinions turn on the fact that the judge declared a mistrial immediately after the officer gave the improper testimony without stating on the record that he had considered alternatives to a mistrial. The importance of such a record was a dividing issue in *Arizona v. Washington*. The majority held that the constitution does not require the trial judge to articulate on the record all the reasons for the mistrial or his consideration of alternatives to mistrial. *Arizona v. Washington*, 434 U.S. at 517. The dissent, however, "would hold that the record must clearly indicate that the trial court made a considered choice among the available alternatives." *Id.* at 526. This case offers the Court an opportunity to clarify its position on whether the consideration of alternatives on the record is an aid to determining whether the trial court correctly exercised its discretion, or is itself constitutionally mandated.

The judge and the prosecutor did everything they could to prevent the introduction of prejudicial opinion testimony and protect the integrity of the trial. The state moved to exclude the testimony before the defense presented its case; the judge granted the state's motion and warned defense counsel that if the evidence came in he would immediately declare a mistrial. A fair interpretation of the trial judge's ruling on the motion in limine is that he considered the opinion testimony so prejudicial that if it came in at trial he felt he would have no alternative but to declare a mistrial. Once the officer gave his opinion, the trial judge immedi-

ately declared a mistrial. At the state level, the outcome of the case turned on the reviewing court's analysis of the sufficiency of the record under *Arizona v. Washington*. The New Mexico Court of Appeals looked at the totality of the circumstances and in particular at the discussion of the evidence at the motion in limine, and found the record sufficient to justify the mistrial. The New Mexico Supreme Court found the mistrial declaration after the testimony precipitous and unsupported by the record. This Court should grant the state's petition in order to clarify the standard of review.

3. SUMMARY OF REASONS FOR GRANTING THE WRIT.

This case presents important and recurring questions regarding the exercise and review of the trial judge's power to declare a mistrial. When the state's case has been seriously prejudiced, the judge has two choices. He may proceed with what he believes is a tainted trial, which may lead to an unjustified and unappealable acquittal. Alternatively, he may declare a mistrial, risking reversal on appeal and discharge of the defendants. This Court needs to give the trial judge more guidance in making this difficult decision.

First, the focus of the examination must be clear. Is the judge supposed to guard the fairness of the trial, or is he only supposed to police misconduct by the participants?

Second, how is the judge to weigh the defendant's double jeopardy interests? Does the defendant retain primary control of the mistrial decision even where the jury has been unfairly prejudiced in his favor? Does a defendant who has moved for mistrial on several occasions have as great an interest in proceeding to verdict with this jury as a defendant who has never moved for mistrial?

Third, to what extent may the judge rely on the broad discretion granted him by *Arizona v. Washington?*

Fourth, what record must the trial judge make to protect his decision?

CONCLUSION

For the foregoing reasons, the State of New Mexico asks this Court to grant the Petition for Writ of Certiorari to review the judgments of the New Mexico Supreme Court in *Callaway* and *Molinar.*

Respectfully Submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

TERRY CALLAWAY,

Petitioner,

vs. No. 18,896

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

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SUPREME COURT OF NEW MEXICO
FILED
JAN 25 1990

/s/ Rose Marie Alderete

OPINION

SOSA, Chief Justice.

We granted petitioner a writ of certiorari to review the court of appeals' 2-1 decision affirming his convictions (*State v. Callaway*, Court of Appeals, No. 10,966, November 7, 1989, Apodaca, J., dissenting). After consideration of the petition, the court of appeals' opinion, arguments raised on the petition and on appeal, and pertinent portions of the appellate record, we reverse the court of appeals. On remand to the district court, the petitioner shall be discharged from custody.

The issue is whether the trial court erred in granting a mistrial in petitioner's first trial, and then denying his motion to bar retrial on double jeopardy grounds. We do not find it necessary to restate the facts leading to mistrial, as the court of appeals' opinion adequately does that. Nor do we find it necessary to reconsider the arguments adduced for and against the trial court's sua sponte granting of mistrial. Suffice it to say that we find Judge Apodaca's dissent persuasive in its disagreement with the majority's opinion.

For clarification, we add the following points to Judge Apodaca's argument. Petitioner had thrice moved for mistrial for reasons unrelated to the grounds on which the trial judge eventually based his order. Petitioner's prior motions should not have detrimentally affected his appeal.

> [W]hether retrial is barred "depends not only upon whether the declaration of mistrial followed a request by the defendant for a mistrial, but whether the mistrial was declared in a manner and under circumstances which fully recognize the right of the defendant to retain that

> primary control [over the course to be followed]. . . ." Even though the defendant has attempted once to waive his right to go to the jury (by the motion), he does not thereby waive the "primary right" to retain control if the attempt is rejected (by denial of the motion).

State v. Flick, 495 A.2d 339, 345 (Me. 1985) (quoting *Braxton v. United States*, 395 A.2d 759, 767 (D.C. Ct. App. 1978)).The quoted rule is doubly applicable when any prior motion for mistrial is predicated on grounds unrelated to those actually relied upon by the court in ordering a mistrial.

The standards to be applied in evaluating a trial court's actions in ordering a mistrial are amply set forth in *State v. Messier*, 101 N.M. 582, 584, 686 P.2d 272, 274 (Ct. App. 1984), and *State v. Saavedra*, 108 N.M. 38, 41-43, 766 P.2d 298, 301-03 (1988), and therefore we shall not discuss those standards here. The majority in the court of appeals opinion did not choose the wrong standards; instead, it misapplied those standards. In particular, the court of appeals' reliance on *Porter v. Ferguson*, 324 S.E. 2d 397 (W. Va. 1984) was misplaced. In that case, defendant's counsel twice deliberately disobeyed the court's order prohibiting inquiry into a key witness' prior arrests. The attorney first asked the witness, "Were you not arrested on anything?", *Id.* at 399, and then, after an explicit admonition, defense counsel once again asked why the witness had been arrested. *Id.*

Contrary to the setting in *Porter*, here defense counsel asked a legitimate question, not prohibited by previous court order, and then got an unresponsive answer from the witness which, had defense counsel

solicited the response, would have violated the court's order. The trial judge then reacted angrily and declared a mistrial, even though the prosecution denied that it wanted a mistrial, and even though defense counsel objected to the granting of a mistrial. We sympathize with the trial court's zeal both in seeking to assure petitioner a fair trial and to protect the State's case from prejudicial assault, but the court went too far. Its justifiable displeasure with the witness was misdirected toward petitioner.

Previous testimony had established that the victim had been dissuaded from filing a complaint against petitioner with police officials. Thus, defense counsel was permitted to have asked the witness, a state trooper, if the trooper had done anything to dissuade the victim from filing a complaint. When the witness then volunteered that he had not believed the victim's story, it was the witness' fault and not that of defense counsel that such prejudicial testimony was injected into the trial. We agree that defense counsel should have sought the witness out and warned him not to disobey the court's order, but the fact that defense counsel was remiss in doing so should not redound to petitioner's harm.

The court in *Porter* stated: "[W]hen the trial court acts irrationally, irresponsibly or precipitately in response to a prosecutor's motion for a mistrial, such action will not be condoned, and double jeopardy will bar a retrial of the accused for the same offense." *Id.*, 324 S.E. 2d at 401. The above rule applies even more forcefully when the trial court sua sponte orders a mistrial.

Further, the trial court here failed to explore other alternatives to a mistrial. *See, eg., State v. Gardner*, 103 N.M. 320, 706 P.2d 862 (Ct. App.), *cert. denied*, 103 N.M. 287, 705 P.2d 1138 (1985). The witness' testimony was not so prejudicial that its damage could not have been corrected by an admonition to the jury to disregard it. The words of the Supreme Court in a similar setting are applicable here: "[I]t seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." *United States v. Jorn*, 400 U.S. 470, 487 (1971). *See Saavedra*. Our holding is made irrespective of the fact the trial court failed to issue findings and conclusions on why it ordered the mistrial. *See Arizona v. Washington*, 434 U.S. 497, 516-17 (1978).

Accordingly, "we can only conclude that reprosecution of the defendant [violated] his right under the Fifth Amendment of the United States Constitution not to be put in jeopardy twice for the same offense." *State v. Sedillo*, 88 N.M. 240, 243, 539 P.2d 630, 633 (Ct. App. 1975).

Reversed and remanded with instructions to discharge petitioner from custody.

IT IS SO ORDERED.

/S/ DAN SOSA, JR., Chief Justice

WE CONCUR:

/s/ RICHARD E. RANSOM, Justice

/s/ SETH D. MONTGOMERY, Justice

/s/ KENNETH B. WILSON, Justice

JOSEPH F. BACA, Justice, Dissenting

BACA, Justice, (Dissenting).

I am unable to agree with the majority's opinion and therefore dissent. I am satisfied with the analysis contained in the majority opinion of the court of appeals with regard to the question of double jeopardy. I would therefore adopt that portion of that opinion as my dissent.

JOSEPH F. BACA, Justice

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

MIKE C. MOLINAR
Petitioner,

vs. NO. 18939

STATE OF NEW MEXICO

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

Honorable Harvey W. Fort

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SUPREME COURT OF NEW MEXICO
FILED
FEB 27 1990
/s/ Rose Marie Alderete

OPINION

PER CURIAM.

Petitioner, Mike C. Molinar, has petitioned us for a writ of certiorari, seeking reversal of his conviction in *State v. Molinar*, Ct. App. No.10,982, November 11, 1989, Apodaca, J., dissenting. We granted his petition, and have issued the writ. Upon review of the case, we find that Molinar was a co-defendant with Terry Callaway in the latter's trial. *See State v. Callaway*, Ct. App. No. 10,966, November 7, 1989, Apodaca, J., dissenting, *reversed, Callaway v. State*, No. 18,896, January 25, 1990, Baca, J., dissenting. As in *Callaway*, petitioner objected to the trial court's *sua sponte* order of mistrial. We thus conclude that petitioner's second trial was constitutionally invalid, for the same reasons we gave in *Callaway*.

Accordingly, we reverse the court of appeals in No. 10,982, and remand the case to the district court with instructions to discharge petitioner from custody.

IT IS SO ORDERED.

/S/ DAN SOSA, JR., Chief Justice

/S/ RICHARD E. RANSOM, Justice

/S/ SETH D. MONTGOMERY, Justice

/S/ KENNETH B. WILSON, Justice

JOSEPH F. BACA, Justice, Dissenting

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

No. 10,966

vs.

TERRY CALLAWAY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUN
HARVEY W. FORT, District Judge

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ALARID, Judge.

Defendant appeals his convictions, upon retrial, on two counts of second-degree criminal sexual penetration (CSP II), and one count each of criminal sexual contact (CSC), aggravated battery, kidnapping, and conspiracy to commit CSP. He raises three issues in his brief: (1) whether retrial, after his first trial ended in a "manifest necessity" mistrial, constituted double jeopardy; (2) whether a new trial should have been granted on the basis of newly discovered evidence; or in the alternative, whether he was denied effective assistance of counsel; and (3) whether his sentence contains an illegal condition. Other issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Fish*, 102 N.M. 775, 701 P.2d 374 (Ct. App. 1985). We affirm.

DOUBLE JEOPARDY

At the first trial, the victim testified that, prior to the attack, she spoke to State Police Officers Garcia and Medina concerning a month-long campaign of harassment and threats by defendant, co-defendant and an unidentified third man. The state believed the defense intended to call the officers for their testimony that they did not believe the victim's allegations of harassment. The state made a motion in limine to exclude evidence concerning the officers' opinions of the victim's veracity. Defense counsel represented that he was planning to ask Officer Medina his opinion of the victim's credibility. Counsel stated that he had not planned to ask Officer Garcia his opinion. The trial court granted the State's motion, and instructed defense counsel to tell Officer Medina not to state his opinion. The trial court specifically told counsel that there would be an immediate mistrial if Officer Medina

gave his opinion. Although the trial court directed counsel to inform only Officer Medina of his ruling, defense counsel was on notice that any opinion evidence concerning the victim's credibility was prohibited. Defense counsel asked Officer Garcia on direct examination if he had done anything to dissuade the victim from filing a complaint. The witness responded that he had not dissuaded the victim, but that he had not believed what she was saying. The trial court immediately declared a mistrial. After the jury left the courtroom, the trial court stated its belief that counsel had been probing for the officer's response. Counsel denied soliciting the response but admitted that he had not cautioned Officer Garcia about the court's ruling in limine. Defense counsel told the court he did not think Officer Garcia would volunteer such opinion so he had not discussed the court's admonition with him. The trial court noted that even if counsel had not acted intentionally, he violated his duty to inform the officer not to give his opinion.

Defendant contends the trial court's sua sponte declaration of a mistrial was not based upon reasons of manifest necessity. This being the case, he argues his retrial constituted double jeopardy.

Both the federal and state constitutions prohibit the state from twice subjecting a person to criminal prosecution for the same offense. U.S. Const. amend. V: N.M. Const. art. II, 15.§The double jeopardy clause also protects a criminal defendant against being retried in some instances when the criminal proceeding was aborted before a final judgment was obtained. *State v. Saavedra*, 108 N.M. 38, 766 P.2d 298 (1988). Jeopardy attaches when the jury is sworn in the first trial, and if the defendant objects to a mistrial he cannot be retried once jeopardy attaches, unless the mistrial was found

to have been declared for reasons of "manifest necessity." *Id.* The question upon appellate review is whether the trial court exercised its sound discretion in deciding there was a manifest necessity for the declaration of a mistrial. *State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975).

The standard for determining the existence of manifest necessity to declare a mistrial involves carefully weighing the defendant's right to have his trial completed against the public's interest in a fair trial and just judgment. *State v. Messier*, 101 N.M 582, 686 P.2d 272 (Ct. App. 1984). Thus, a grant of mistrial is not proper merely to allow the state to strengthen its case upon retrial, or to secure the attendance of a witness which it neglected to subpoena or have present at trial. *Id.* The prosecutor must shoulder a heavy burden to justify the mistrial if the double jeopardy bar is to be avoided. *Arizona v. Washington*, 434 U.S. 497 (1978); *State v. Saavedra.*

In *Porter v. Ferguson*, 324 S.E.2d 397 (W. Va. 1984), the court considered a case similar in part to the present case. In *Porter*, defense counsel violated an order of the trial court issued after an in-limine hearing. The trial court directed that defense counsel not inquire into the fact of a previous arrest of a key prosecution witness on charges unrelated to those pending against the defendant. The court upheld the trial court's sua sponte declaration of a mistrial, observing that a general rule has evolved to the effect that improper conduct of defense counsel which prejudices the state's case may give rise to manifest necessity for the granting of a mistrial. The court found that the trial court did not abuse its discretion because defense counsel's questioning of the witness was in violation of the court's in-limine order, that defense counsel had been

cautioned in advance not to conduct such inquiry and despite such warning counsel embarked on the line of questioning, and that the effect of such questioning prejudiced the state's case. Under these facts, the court in *Porter* determined that the trial court did not act precipitously, and the sua sponte granting of a mistrial came within the ambit of manifest necessity.

Defendant maintains the trial court abused its discretion in declaring the mistrial by acting hastily and failing to consider alternatives.[1] We hold that under the circumstances of this case, the trial court properly declared the mistrial.

Explicit findings on the presence of manifest necessity are not determinative of the issue involved, but the record must contain sufficient justification for the granting of the mistrial. *Arizona v. Washington: State v. Messier.* Where the conduct of the defense may have affected the partiality of the jury, the trial court's evaluation of the need for a mistrial is accorded the highest degree of respect. *Arizona v. Washington: see also State v. Fosse*, 144 Wis. 2d 700, 424 N.W.2d 725 (Ct. App. 1988). We agree with the state that situations in which the conduct of the defense has affected the trial create a difficult dilemma for the trial judge. If the trial court does not grant the mistrial, the prejudice could result in an unjust acquittal. On the other hand, if the trial court grants the mistrial the defendant will be discharged if an appellate court disagrees with the finding of manifest necessity. Under these circumstances, the trial court's decision should be accorded considerable deference.

Officer Garcia's comment seriously prejudiced the state's case. The state presented little evidence

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1. We note that prior to the trial court's order declaring a mistrial, the record indicates that defense counsel had moved for a mistrial on differing grounds on three occasions. These motions were denied.

corroborating the victim's testimony. There was scant physical evidence of a sexual assault. The defendant presented alibi testimony. Thus, the victim's credibility was crucial to the state's case.

We find little support for defendant's position from our decisions in *Sedillo* and *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct. App. 1975). In *Sedillo*, the defense misconduct did not go to the "very vitals of the trial itself." *Id.* at 242, 539 P.2d at 632. By contrast, Officer Garcia's comment in this case was potentially devastating since the state's case was based almost entirely upon the victim's credibility. In *De Baca*, the alleged jury tampering did not create any possibility of juror bias. In this case, there can be little question that the officer's comment materially undermined the victim's credibility before the jury.

We also do not believe that the state used the mistrial to its tactical advantage by presenting new evidence and witnesses. The state did not move for the mistrial. *See State v. Messier.* Similarly, our review of the record does not support an inference that the state sought to gain, or would gain, any advantage from a mistrial. *See id.* The fact that the state did not present the identical case on retrial is not determinative of this issue. *Compare United States v. Kin Ping Cheung*, 485 F.2d 689 (5th Cir. 1973). The trial court's exercise of discretion concerning whether to grant a mistrial is entitled to some weight in cases where defense counsel's failure to comply with a ruling of the court may serve to bias the jury against the state. *See State v. Fosse: see also United States v. Kwang Fu Peng*, 766 F.2d 82 (2d Cir. 1985).

Defendant argues that the trial court did not explore possible alternatives to a mistrial. A trial court has a duty to inquire into the alternatives before declaring a mistrial. *State v. De Baca*. The trial court, however, is not required to make a detailed record of each alternative considered before declaring a mistrial. *Id.*: *State v. Messier*. The trial court's declaration of a mistrial should not be overturned solely because it failed to articulate all the factors which were considered in the exercise of its discretion. *See Arizona v. Washington*. We recognize that the trial judge's vitriolic outburst in his sua sponte declaration of a mistrial was inappropriate and we do not condone such conduct. However, just prior to the in-court presentation of Officer Garcia's testimony, the court in-chambers ruled on the state's motion in limine, and the trial judge stated that it would be improper to question the officers concerning their belief as to the victim's credibility and that a mistrial would result if such testimony were proffered. The in-chambers hearing and ruling by the trial court indicates that the court considered such questioning to be improper and of such seriousness such as not to be curable by an admonition to the jury. *Compare State v. Gardner*, 103 N.M. 320, 706 P.2d 862 (Ct. App. 1985) (prejudicial response generally cured by prompt admonition from the trial court). Under the circumstances here presented, the trial court could reasonably conclude that an admonition to the jury would be insufficient to remove the prejudice resulting from the officer's comment. *See Arizona v. Washington*. This is especially true where the victim's credibility was the crucial factor in the state's case. We believe the trial court was in the best position to evaluate how Officer Garcia's improper

opinion affected the jury. *See id.* Moreover, defense counsel was on notice that a mistrial would be declared if an opinion of the victim's credibility was introduced. Balancing defendant's right to have his trial completed and the public's interest in a fair trial and just judgment, we conclude the record contains sufficient justification for the trial court's declaration of the mistrial.

MOTION FOR NEW TRIAL

At the sentencing hearing, defendant's newly retained counsel made an offer of proof that defendant's ex-wife would testify that the Callaways had engaged in "wife-swapping" with the victim and her husband several years before the attack. Defendant also represented that his former wife would testify that the victim was present at his home on numerous occasions when Mrs. Callaway was not present. Counsel represented that Mrs. Callaway had refused to communicate this information to trial counsel, James Klipstine, because Klipstine had represented defendant in their divorce. The new evidence was offered to impeach the victim's testimony that she had never had an affair with the defendant and was never in his home when Mrs. Callaway was not present. The trial court denied the motion.

A motion for new trial on the basis of newly discovered evidence must meet six requirements: (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. *State v. Volpato*, 102 N.M. 383, 696 P.2d 471 (1985). The trial court's denial of a motion for a new trial will not be disturbed on

appeal unless the ruling is arbitrary, capricious or beyond reason. *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979).

Defendant has not demonstrated that the evidence could not have been discovered before the trial by the exercise of due diligence. An out-of-state subpoena was issued for Mrs. Callaway's attendance at the first trial, and she was listed as a witness for the second trial. Moreover, if Mrs. Callaway's allegations were true, they would have been known to defendant. Thus, counsel could have discovered the evidence about the alleged affair through the use of due diligence. Defendant's motion for a new trial was properly denied.

Alternatively, defendant argues he was denied effective assistance of counsel. At a post-conviction motion, defendant represented to the court that he told his trial counsel that the victim told defendant that he was the father of her daughter. Defendant contends this evidence was material to the reasons given by the victim for changing her story. The victim testified that she did not originally name defendant because he threatened her daughter. Defendant asserts that evidence that the victim told him that he was the father of her daughter would have undermined the credibility of the victim's assertions concerning why she changed her account. Trial counsel did not elicit this information from the victim on cross-examination, or from the defendant when he testified.

An accused is entitled to effective representation of counsel. *State v. Dean*, 105 N.M. 5, 727 P.2d 944 (Ct. App. 1986). The test for determining whether an accused has been afforded effective assistance of counsel is whether defense counsel exercised the skill, judgment and diligence of a reasonably competent

defense attorney. *Id.* Defendant bears the burden of showing both the incompetence of his attorney and proof of prejudice. *State v. Talley*, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985). This court will not attempt to second-guess the tactics and strategy of trial counsel on appeal. *State v. Helker*, 88 N.M. 650, 545 P.2d 1028 (Ct. App. 1975), *cert. denied*, 429 U.S. 836 (1976). We believe the matters complained of by defendant went to trial tactics and strategy. *See State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972) (decision to call witnesses, cross-examination are matters of tactics and strategy).

DEFENDANT'S SENTENCE

The trial court imposed the basic sentence for each offense. Each basic sentence was to be served consecutively, for a total of 34 and one-half years. The trial court noted the premeditated nature of the attack, citing evidence of a month-long campaign of terror perpetrated against the victim by the defendant prior to the crimes. The trial court offered to cut defendant's sentence in half if he provided information pertaining to the third individual involved in the attack. (The same offer was made to co-defendant Molinar.) The victim testified that a third man took part in the crimes. This individual was never identified. Defendant argues that the trial court's offer constituted an illegal condition and that he is entitled to be resentenced. Specifically, defendant contends that the trial court imposed additional punishment based upon defendant's refusal to cooperate. He points out that in order to accept the judge's offer, he would have to effectively admit that his alibi testimony, as well as that of his stepfather and mother, was perjured.

A sentencing judge may take into account as a

mitigating factor a defendant's voluntary cooperation with authorities. *United States v. Bradford*, 645 F.2d 115 (2nd Cir. 1981). However, it is also well-settled that a sentence may not be increased based upon a defendant's failure to cooperate. *Id*: *see also DiGiovanni v. United States*, 596 F.2d 74 (2nd Cir. 1979) (improper to administer additional punishment to defendant who exercises his right to remain silent). There is a distinction between vindictiveness by enhancing a penalty, on the one hand, and a refusal to grant leniency, on the other. *Damiano v. Gaughan*, 770 F.2d 1 (1st Cir. 1985): *Mallette v. Scully*, 752 F.2d 26 (2nd Cir. 1984). We recognize the inherent difficulty trial courts have in making such a distinction. Nonetheless, under the facts of this case, we are convinced that the trial court was offering leniency to the defendant.

The trial court imposed the basic sentence for each offense, without enhancement pursuant to NMSA 1978, Section 31-18-15.1 (Repl. Pamp. 1987). The court cited the premeditated nature of the offenses in imposing sentence. In offering to cut his sentence by one-half, Judge Fort noted defendant's age. At no time during the sentencing hearing did the trial court tell defendant that he was imposing a more serious sentence because of his failure to identify the third accomplice. Our review of the sentencing hearing does not indicate that the state made any issue of defendant's cooperation. In *DiGiovanni*, cited by defendant, the trial judge specifically stated that he was imposing a more serious sentence because of the defendant's reluctance in assisting the government. *See also United States v. Stratton*, 820 F.2d 562 (2nd Cir. 1987). Contrary to defendant's assertion, we are convinced that the trial court was simply extending an

offer of leniency to the defendant. This was permissible. *Damiano v. Gaughan.*

Defendant also argues that the sentence is not sufficiently definite. He maintains the Corrections Department has no way of knowing whether he has been sentenced to 34 and one-half or 17 and one-quarter years. We disagree. Since defendant did not come forward within thirty days, the sentence of 34 and one-half years remained in effect. Defendant also argues that the sentence may constitute a danger to him since inmates who come to possess knowledge of the condition contained in the sentence might regard him as a "snitch." We find defendant's argument to be speculative. If defendant chose not to reveal his accomplice because he feared retaliation, he should have brought this fact to the attention of the trial court. *See United States v. Bradford.* Finally, defendant argues that the trial judge could not have made good on his offer since Section 31-18-15.1 only allows the court to alter the basic sentence by one-third. Nevertheless, Judge Fort could have effectively cut the sentence in half through a combination of reduction and suspension. *See* 31-18-15.1: NMSA 1978, 31-20-3 (Repl. Pamp. 1987).

Defendant's judgment and sentence are affirmed.

IT IS SO ORDERED.

/S/ A. JOSEPH ALARID, Judge

I CONCUR:

/s/ THOMAS A DONNELLY, Judge

RUDY S. APODACA, Judge (Dissenting)

APODACA, Judge (Dissenting).

I respectfully dissent. The majority has correctly stated the standard of review in this appeal. Did the trial court abuse its discretion in determining there was manifest necessity in declaring a mistrial? On review, the propriety of a trial court's determination that manifest necessity exists to justify a mistrial declaration is measured by the specific facts of each case. *United States v. Sisk*, 629 F.2d 1174 (6th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981). Applying the same constitutionally mandated principles the majority has applied, I have concluded that under the particular facts of this appeal, the record clearly shows the trial court abused its discretion.

The majority concedes the state "must shoulder a heavy burden to justify the mistrial if the double jeopardy bar is to be avoided[,]" citing *Arizona v. Washington*, 434 U.S. 497 (1978). Absent in the majority's application of this constitutional principle, however, is the rigid standard by which we measure whether the state has met its burden. This standard was aptly stated in *Arizona v. Washington*:

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. ...Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.

Id. at 505-06.

The majority, citing *Arizona* and *State v. Messier*, 101 N.M. 582, 686 P.2d 272 (Ct. App. 1984), additionally concedes that, although explicit findings on

the presence of manifest necessity are not dispositive of the issue before this court, the record must nonetheless provide "sufficient justification for the granting of the mistrial." *Arizona v. Washington* (entry in record of findings and explanation of reasons supporting trial court's declaration of mistrial, although facilitating review by appellate court, is not essential if the basis for mistrial declaration is adequately disclosed by record, including extensive argument of counsel before judge's ruling). *State v. Messier* (explicit findings of manifest necessity, although strongly recommended, not determinative, if record provides sufficient justification for mistrial declaration, including the trial court's consideration of other reasonable alternatives). *State v. Saavedra*, 108 N.M. 38, 766 P.2d 298 (1988) (trial judge's exercise of discretion should not be overruled absent clear indication he failed to engage in scrupulous exercise of judicial discretion, inlcuding due consideration of possible alternatives). *Saavedra* is our supreme court's most recent pronouncement on the issue before us.

Arizona, *Messier* and *Saavedra* all have a significant, common thread: the record in each case clearly indicated (1) the basis for the mistrial or (2) that the trial court considered other viable alternatives. These requirements, then, were essentially satisfied in those three cases. Without detailing the precise steps taken by the respective trial courts in those cases, I need only state they were substantial. What the trial courts did there, when compared with what the trial court did *not* do here, distinguishes this case materially. The record in this appeal is sorely lacking of any hint whatsoever that the trial court ever considered other alternatives.

In this regard, the majority recognizes that the trial court's "vitriolic outburst in his sua sponte declaration of mistrial was inappropriate" and not to be condoned. Notwithstanding this recognition, the majority nevertheless gives undue weight to the in-chambers proceeding at which the trial court heard the state's motion in limine seeking to exclude opinion testimony of two police officers. I submit that in so doing, as well as in concluding that Officer Garcia's uninvited, unsolicited comment seriously prejudiced the state's case, the majority is performing judicial "cosmetic surgery" on the trial court's conduct. The record reflects a total abscence of reflection on the part of the trial court in consideration of other alternatives to a mistrial. Instead, its ruling at the in-limine hearing, although not approaching the ill-advised behavior that the majority itself categorizes as "vitriolic," was spontaneous, if not regrettably impulsive, and did not represent the thought and consideration employed by the respective trial courts in *Arizona, Messier* and *Saavedra.*

There is one other, important element in this appeal that necessitates reversal. The reasoning of the majority, to a great extent, rests on what it contends was defense counsel's "misconduct" in eliciting Officer Garcia's opinion testimony concerning the victim's credibility or veracity. *Porter v. Ferguson*, 324 S.E. 2d 397 (W. Va. 1984), relied on by the majority in this connection, is factually distinguishable. In upholding the trial court's sua sponte mistrial declaration in *Porter*, the reviewing court emphasized defense counsel's clearly improper conduct in intentionally violating the trial court's upholding of a trial court's mistrial declaration, as was the case in *Porter.*

In reviewing the audio tapes of the in-limine hearing and that segment of the trial involving Officer Garcia's unsolicited remark and the exchange that transpired between counsel and the trial court, I deduced no showing of misconduct, only the trial court's notion that there had been. The trial court's perception was tainted, I believe, by what it interpreted as a direct, personal attack on its prior ruling. It is the epitome of irony that the trial court's conduct, in the presence of the jury, itself formed the basis for a mistrial, had defendant chosen to request one. In this connection, I fail to see the significance the majority attributes to the fact that defense counsel requested a mistrial on three previous occasions. That fact, to my knowledge, has never been relevant in resolving the issue before us.

In performing the cosmetic surgery I noted earlier, the majority has now joined the trial court's company in concluding that defense counsel prodded for the allegedly inadmissable and damaging testimony. I disagree with this interpretation of what occurred in the trial proceeding. Not only was the opinion testimony nonresponsive to defense counsel's question, but defense counsel, after the trial court's mistrial declaration, painstakingly explained his motives and intentions on the record. What follows is my understanding of this explanation.

The victim, Tammy Lewis, had previously testified that the state police (which included Officer Garcia) had attempted to dissuade her from filing a complaint. She also stated the police had maintained they could not pursue the matter because the case was not within their jurisdiction. In an attempt to discredit the victim,

defense counsel sought to elicit testimony from Officer Garcia to the effect that neither he nor anyone else ever attempted to discourage the victim from "filing a complaint." The lead-up questions to the ultimate question that unfortunately led Officer Garcia to offer the allegedly inadmissable testimony reasonably indicate that was defense counsel's intent.

Defense counsel also reminded the trial court that its ruling on the motion in limine pertained only to another officer, not Officer Garcia, and that defense counsel had stated at that hearing he never intended to procure the opinion testimony from Officer Garcia. The basis for this decision was that, to counsel's knowledge, Officer Garcia had never held any opinion of the victim's veracity. Counsel explained he thought of warning the officer not to give any kind of opinion testimony, but that when the officer had entered the courtroom, counsel did not want to admonish him, lest the jury conclude he was inappropriately "coaching" him.

Counsel informed the trial court that when he realized Officer Garcia's answer was nonresponsive to the specific question asked, he did not stop him because he did not want the jurors to think he was trying to keep something from them. He explained further that when Officer Garcia's answers previously had been nonresponsive to the state's questions on direct examination, he (defense counsel) decided not to object, for fear the jury would believe he did not want damaging testimony to be introduced. Thus, in my judgment, there is absolutely nothing in the record indicating defense counsel was guilty of misconduct, but only the trial court's personal opinion that counsel purposely and intentionally, in violation of the in-limine order, went on a fishing expedition for the damaging

I conclude there was an absence in this appeal of manifest necessity and would therefore reverse defendant's convictions.

/S/ _____
RUDY S. APODACA, Judge

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs. No. 10,982

MIKE C. MOLINAR,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF EDDY COUNTY
HARVEY W. FORT, District Judge

HAL STRATTON, Attorney General
GAIL MacQUESTEN, Assistant Attorney General
Santa Fe, New Mexico Attorneys for Plaintiff-Appellee

JACQUELYN ROBINS, Chief Public Defender
PETER RAMES, Ass't Appellate Defender
Santa Fe, New Mexico Attorneys for Defendant-Appellant

MEMORANDUM OPINION

ALARID, Judge.

Defendant appeals his convictions, upon retrial, on two counts of second-degree criminal sexual penetration (CSP II), and one count each of criminal sexual contact (CSC), aggravated battery, kidnaping, and conspiracy to commit CSP. He raises six issues on appeal: (1) whether his retrial after the first trial ended in a "manifest necessity" mistrial constituted double jeopardy; (2) whether one count of the information alleging CSP should have been dismissed; (3) whether evidence of contact between defendant, his codefendant,

and the victim prior to the attack should have been excluded; (4) whether a new trial should have been granted because the jury misapprehended the jury instructions and the facts; (5) whether a new trial should have been granted on the basis of newly discovered evidence; and (6) whether the verdicts are supported by substantial evidence. Defendant filed a motion to amend his docketing statement to include a seventh issue. We find the issue to be so without merit as not to be viable on appeal. *See State v. Rael*, 100 N.M. 193, 668 P.2d 309 (Ct. App. 1983). Accordingly, we deny the motion to amend. We also deny defendant's motion for timely disposition. The state requested no further extensions within which to file its answer brief. The motion is therefore moot. For the reasons stated herein we affirm defendant's convictions.

DOUBLE JEOPARDY

Defendant contends the trial court's sua sponte declaration of a mistrial was not based upon reasons of manifest necessity. This being the case, he argues his retrial constituted double jeopardy.

Defendant was tried with his codefendant, Terry Callaway. Callaway has raised the identical issue in the appeal of his conviction. *See State v. Callaway*, Ct. App. No. 10,966. The facts and considerations regarding this issue are equally applicable to both defendants. We have decided that Callaways' retrial was not barred by double jeopardy. *See id.* Accordingly, we similarly hold in this case that the state's retrial of defendant did not violate his right to be free of double jeopardy. *See* U.S. Const. amend. V: N.M. Const. art. II 15.

MOTION TO DISMISS

Defendant was charged with two counts of CSP II in the criminal information filed June 23, 1987. The state tried defendant as a principal in one of the counts, based upon the victim's testimony that he inserted his finger in her vagina. Defendant was tried as an accessory on the other count, based upon evidence that he assisted his codefendant in forcing the victim to commit fellatio. Pursuant to *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967), and *State v. Boyer*, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985), defendant argues the trial court erred in failing to dismiss the accessory count.

A person may be convicted of a crime as an accessory "if he procured, counsels, aids or abets in its commission ..." *See* NMSA 1978, 30-1-13 (Repl. Pamp. 1984). To sustain a conviction as an aider or abettor there must be a community of purpose, a partnership, in the unlawful undertaking. *State v. Luna*, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979). This community of purpose may be shown by evidence of acts, conduct, words, signs or any means sufficient to incite, encourage or instigate commission of the offense. *Id.*

In this case, there was ample evidence to charge and convict defendant of aiding or abetting. There was evidence that codefendant Callaway called defendant to tell him that the victim was leaving her home. The victim testified that defendant jumped out of the car, restrained her, and forced her into the car. Both defendants undressed the victim, and Callaway and the third attacker held her down while defendant attempted

to have intercourse with her. The two were still restraining the victim when defendant penetrated the victim's vagina with his finger. Defendant and the third man touched the victim while Callaway forced her to perform fellatio. This evidence showed a community of purpose which was adequate to charge and convict defendant as an aider or abettor.

EVIDENCE OF HARASSMENT

The victim testified about acts of harassment committed by the defendants and the unidentified third man during the month prior to the attack. Defendant argues such evidence was improperly admitted to show defendant's motive. Specifically, defendant complains of admission of evidence that defendant came to the victim's house with the third man on April 14, 1987, claiming to be an officer in the State Police. Defendant ordered the victim to assist him in setting someone up with cocaine. Defendant threatened to set up the victim's husband with cocaine if she did not help them. The state argues that evidence of the defendant's harassment of the victim was relevant to show both motive and identity.

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. SCRA 1986, 11-404(B). It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Id.* Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or

needless presentation of cumulative evidence. SCRA 1986, 11-403. When the trial court has applied the balancing test of Rule 11-403, the appellate issue is whether the trial court's ruling was an abuse of discretion. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.), *cert. denied*, 454 U.S. 853 (1981). The fact that competent evidence may tend to prejudice the defendant is not grounds in and of itself for exclusion of that evidence. *State v. Garcia*, 99 N.M. 771, 664 P.2d 969, *cert. denied*, 462 U.S. 1112 (1983).

We do not decide whether the evidence of harassment was relevant to show a motive for the attack. Defendant presented an alibi defense. Thus, the tendered evidence was relevant on the question of defendant's identity. *See State v. Allen*, 91 N.M. 759, 581 P.2d 22 (Ct. App. 1978). When evidence is admissible under any theory, the trial court's decision to admit it will be upheld. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), *rev'd on other grounds*, 100 N.M. 583, 673 P.2d 1316 (1984). *See State v. Beachum*, 83 N.M. 526, 494 P.2d 188 (Ct. App. 1972) (decision of the trial court will be upheld if right for any reason). The trial court acted within its discretion in admitting the evidence.

SUBSTANTIAL EVIDENCE

Defendant contends the jury's verdicts are unsupported by substantial evidence, and were a result of its misapprehension of the jury instructions and the facts presented. He argues that the facts of this case suggest that the verdicts were not derived from a fair and impartial trial, relying on his alibi defense as well as inconsistencies in the victim's testimony.

In determining whether the evidence supports a criminal charge or an essential element thereof, we

view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of a verdict of conviction. *State v. Lankford*, 92 N.M. 1, 582 P.2d 378 (1978). We do not weigh the evidence and may not substitute our judgment for that of the jury. *Id.* Where testimony is conflicting, such conflict raises a question for the jury. *Id.* In a prosecution for CSP, the testimony of the victim need not be corroborated and the lack of corroboration has no bearing on the weight to be given the testimony. NMSA 1978,§30-9-15 (Repl. Pamp. 1984); *State v. Hunter*, 101 N.M. 5, 677 P.2d 618, *cert. denied*, 469 U.S. 838 (1984).

We find substantial evidence supporting each of defendant's convictions. His kidnaping conviction was supported by evidence that he grabbed the victim, pushed her into the car, and restrained her. *See* NMSA 1978,§30-4-1 (Repl. Pamp. 1984). Defendant's conviction for aggravated battery is supported by evidence that he struck the victim in the face with the butt of his knife. *see* NMSA 1978,§30-3-5 (Repl. Pamp. 1984) Defendant's conviction as an accessory to CSP has already been discussed in this opinion. The victim testified that defendant penetrated her vagina during the kidnaping. This was sufficient to sustain his conviction on the second count of CSP. *See* NMSA 1978, §30-9-11(b) (Repl. Pamp. 1984). Defendant's conviction for CSC was supported by the victim's testimony that he touched her unclothed vagina without her consent, using physical force while the other two men held her down. *See* NMSA 1978,§30-9-12 (Repl. Pamp. 1984). Finally, the conspiracy to commit CSP charge was supported by evidence that the defendants agreed to find the victim while she was jogging, acted together to get her into the car, undressed her, and restrained her while the other committed CSP. *See* NMSA 1978, §30-28-2 (Repl. Pamp. 1984).

We recognize the relative lack of corroborative evidence in this case. Defendant also presented alibi witnesses in his defense. The state also acknowledges that the victim's testimony was both supported and contradicted by other evidence at the trial. Nevertheless, there was substantial evidence before the jury to convice defendant on all counts. *See State v. Lankford: State v. Hunter*. The matters of witness credibility and conflicting testimony were for the jury to decide. *State v. Lankford*.

MOTION FOR NEW TRIAL

We have decided that the trial court did not abuse its discretion in denying codefendant Callaway's motion for a new trial on the ground that the newly-discovered evidence could have been discovered before trial through the use of due diligence. *See State v. Callaway*. We note that defendant joined in Callaway's motion, and the facts and considerations involved in our review are the same in both cases. Accordingly, we affirm the trial court's denial of the motion for new trial.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

/S/ A. JOSEPH ALARID, Judge

I CONCUR:

/S/ THOMAS A. DONNELLY, Judge

RUDY S. APODACA, Judge (Dissenting)

APODACA, Judge (dissenting).

I respectfully dissent for the same reasons discussed in my dissent in *State v. Callaway*, Ct. App. No. 10,966 filed November 7, 1989, which is attached and incorporated by reference.

/S/ RUDY S. APODACA, Judge

APODACA, Judge (Dissenting).

I respectfully dissent. The majority has correctly stated the standard of review in this appeal. Did the trial court abuse its discretion in determining there was manifest necessity in declaring a mistrial? On review, the propriety of a trial court's determination that manifest necessity exists to justify a mistrial declaration is measured by the specific facts of each case. *United States v. Sisk*, 629 F.2d 1174 (6th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981). Applying the same constitutionally mandated principles the majority has applied, I have concluded that under the particular facts of this appeal, the record clearly shows the trial court abused its discretion.

The majority concedes the state "must shoulder a heavy burden to justify the mistrial if the double jeopardy bar is to be avoided[,]" citing *Arizona v. Washington*, 434 U.S. 497 (1978). Absent in the majority's application of this constitutional principle, however, is the rigid standard by which we measure whether the state has met its burden. This standard was aptly stated in *Arizona v. Washington*:

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. ...Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.

Id. at 505-06.

The majority, citing *Arizona* and *State v. Messier*, 101 N.M. 582, 686 P.2d 272 (Ct. App. 1984), additionally concedes that, although explicit findings on

the presence of manifest necessity are not dispositive of the issue before this court, the record must nonetheless provide "sufficient justification for the granting of the mistrial." *Arizona v. Washington* (entry in record of findings and explanation of reasons supporting trial court's declaration of mistrial, although facilitating review by appellate court, is not essential if the basis for mistrial declaration is adequately disclosed by record, including extensive argument of counsel before judge's ruling). *State v. Messier* (explicit findings of manifest necessity, although strongly recommended, not determinative, if record provides sufficient justification for mistrial declaration, including the trial court's consideration of other reasonable alternatives). *State v. Saavedra*, 108 N.M. 38, 766 P.2d 298 (1988) (trial judge's exercise of discretion should not be overruled absent clear indication he failed to engage in scrupulous exercise of judicial discretion, inlcuding due consideration of possible alternatives). *Saavedra* is our supreme court's most recent pronouncement on the issue before us.

Arizona, *Messier* and *Saavedra* all have a significant, common thread: the record in each case clearly indicated (1) the basis for the mistrial or (2) that the trial court considered other viable alternatives. These requirements, then, were essentially satisfied in those three cases. Without detailing the precise steps taken by the respective trial courts in those cases, I need only state they were substantial. What the trial courts did there, when compared with what the trial court did *not* do here, distinguishes this case materially. The record in this appeal is sorely lacking of any hint whatsoever that the trial court ever considered other alternatives.

In this regard, the majority recognizes that the trial court's "vitriolic outburst in his sua sponte declaration of mistrial was inappropriate" and not to be condoned. Notwithstanding this recognition, the majority nevertheless gives undue weight to the in-chambers proceeding at which the trial court heard the state's motion in limine seeking to exclude opinion testimony of two police officers. I submit that in so doing, as well as in concluding that Officer Garcia's uninvited, unsolicited comment seriously prejudiced the state's case, the majority is performing judicial "cosmetic surgery" on the trial court's conduct. The record reflects a total abscence of reflection on the part of the trial court in consideration of other alternatives to a mistrial. Instead, its ruling at the in-limine hearing, although not approaching the ill-advised behavior that the majority itself categorizes as "vitriolic," was spontaneous, if not regrettably impulsive, and did not represent the thought and consideration employed by the respective trial courts in *Arizona*, *Messier* and *Saavedra*.

There is one other, important element in this appeal that necessitates reversal. The reasoning of the majority, to a great extent, rests on what it contends was defense counsel's "misconduct" in eliciting Officer Garcia's opinion testimony concerning the victim's credibility or veracity. *Porter v. Ferguson*, 324 S.E. 2d 397 (W. Va. 1984), relied on by the majority in this connection, is factually distinguishable. In upholding the trial court's sua sponte mistrial declaration in *Porter*, the reviewing court emphasized defense counsel's clearly improper conduct in intentionally violating the trial court's upholding of a trial court's mistrial declaration, as was the case in *Porter*.

In reviewing the audio tapes of the in-limine hearing and that segment of the trial involving Officer Garcia's unsolicited remark and the exchange that transpired between counsel and the trial court, I deduced no showing of misconduct, only the trial court's notion that there had been. The trial court's perception was tainted, I believe, by what it interpreted as a direct, personal attack on its prior ruling. It is the epitome of irony that the trial court's conduct, in the presence of the jury, itself formed the basis for a mistrial, had defendant chosen to request one. In this connection, I fail to see the significance the majority attributes to the fact that defense counsel requested a mistrial on three previous occasions. That fact, to my knowledge, has never been relevant in resolving the issue before us.

In performing the cosmetic surgery I noted earlier, the majority has now joined the trial court's company in concluding that defense counsel prodded for the allegedly inadmissable and damaging testimony. I disagree with this interpretation of what occurred in the trial proceeding. Not only was the opinion testimony nonresponsive to defense counsel's question, but defense counsel, after the trial court's mistrial declaration, painstakingly explained his motives and intentions on the record. What follows is my understanding of this explanation.

The victim, Tammy Lewis, had previously testified that the state police (which included Officer Garcia) had attempted to dissuade her from filing a complaint. She also stated the police had maintained they could not pursue the matter because the case was not within their jurisdiction. In an attempt to discredit the victim,

defense counsel sought to elicit testimony from Officer Garcia to the effect that neither he nor anyone else ever attempted to discourage the victim from "filing a complaint." The lead-up questions to the ultimate question that unfortunately led Officer Garcia to offer the allegedly inadmissable testimony reasonably indicate that was defense counsel's intent.

Defense counsel also reminded the trial court that its ruling on the motion in limine pertained only to another officer, not Officer Garcia, and that defense counsel had stated at that hearing he never intended to procure the opinion testimony from Officer Garcia. The basis for this decision was that, to counsel's knowledge, Officer Garcia had never held any opinion of the victim's veracity. Counsel explained he thought of warning the officer not to give any kind of opinion testimony, but that when the officer had entered the courtroom, counsel did not want to admonish him, lest the jury conclude he was inappropriately "coaching" him.

Counsel informed the trial court that when he realized Officer Garcia's answer was nonresponsive to the specific question asked, he did not stop him because he did not want the jurors to think he was trying to keep something from them. He explained further that when Officer Garcia's answers previously had been nonresponsive to the state's questions on direct examination, he (defense counsel) decided not to object, for fear the jury would believe he did not want damaging testimony to be introduced. Thus, in my judgment, there is absolutely nothing in the record indicating defense counsel was guilty of misconduct, but only the trial court's personal opinion that counsel purposely and intentionally, in violation of the in-limine order, went on a fishing expedition for the damaging testimony.

I conclude there was an absence in this appeal of manifest necessity and would therefore reverse defendant's convictions.

/S/ RUDY S. APODACA, Judge

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Wednesday, February 14, 1990

NO. 18,896

TERRY CALLAWAY,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon Motion of Respondent for rehearing and request for oral argument, and the Court having considered said motions and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motions of Respondent for rehearing and for oral argument are hereby denied.

ATTEST: A TRUE COPY

/S/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Tuesday, March 20, 1990

NO.18,939

MIKE C. MOLINAR,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon Motion of Respondent for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion for Rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Friday, March 30, 1990

NO. 18,939

MIKE C. MOLINAR,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

AMENDED ORDER

WHEREAS, it appearing to the Court that the order entered herein March 20, 1990 should be amended, and good cause appearing therefor;

NOW, THEREFORE, IT IS ORDERED that the order reflect that it was the Petitioner who filed the motion for rehearing, not the Respondent.

ATTEST: A TRUE COPY

/S/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

No. 89-1664

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF NEW MEXICO, Petitioner

vs.

TERRY CALLAWAY AND MIKE C. MOLINAR, Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW MEXICO

RESPONDENTS' BRIEF IN OPPOSITION

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No. 89-1664

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF NEW MEXICO, Petitioner

vs.

TERRY CALLAWAY AND MIKE C. MOLINAR, Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

The respondents, Terry Callaway and Mike C. Molinar, respectfully pray that no writ of certiorari issue to the Supreme Court of New Mexico, to review the opinions entered in Callaway v. State on January 25, 1990, and in Molinar v. State, on February 27, 1990.

OPINIONS BELOW

The New Mexico Supreme Court's opinion in Callaway v. State is reported at 785 P.2d 1035, and will be reported at 109 N.M. 416. The New Mexico Supreme Court's opinion in Molinar v. State is reported at 787 P.2d 455. Both opinions are reprinted in Appendix A of the State of New Mexico's petition.

The New Mexico Court of Appeals' formal opinion in State v. Callaway is reported at 787 P.2d 1247. The New Mexico Court of Appeals issued a memorandum opinion in State v. Molinar. Both opinions are reprinted in Appendix B of the State of New Mexico's petition.

STATEMENT OF JURISDICTION

The State of New Mexico filed its petition for certiorari April 16, 1990, invoking this Court's jurisdiction pursuant to 28 U.S.C. 1257(a). This brief in opposition will be timely if filed on or before Monday, May 14, 1990.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V (Double Jeopardy Clause):

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;..."

U.S. Constitution, Amendment XIV (Due Process Clause):

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law;..."

CORRECTIONS TO THE STATEMENT OF THE CASE

Respondents respectfully bring to this Court's attention several inaccuracies and omissions in the petitioner's statement of the case. At least one of these inaccuracies is so fundamental as to require a rewording of the issue presented.

First: Respondents accept the statement of the charges brought against them as recited by the state, except that there is no crime of "gang-rape", or rape, in New Mexico. It was part of the defense theory of the case that Ms. Lewis had either not been raped at all, or was accusing the respondents out of fear of whoever had actually assaulted her. Testimony was elicited from the Emergency Room nurse who first examined Ms. Lewis at the hospital that Ms. Lewis said she had been raped by two men in a blue van, who knew her husband and attacked her to get back at him. [T2/17/108]* At trial, Ms. Lewis' testimony was that she had been attacked by three men, in cluding both respondents and an unknown third man, in Mr. Molinar's car: a black Thunderbird sedan with red pinstripes. [P/3/300; P/6/100; T1/3/586].

Second: Respondents would point to the petition's characterization of defense motions for mistrial as relating to "various evidentiary rulings" [petition, p.3]. One of the defense mistrial motions had to do with the trial court's continued interruption of defense counsel on cross-examination. [T1/11/158]. A second had to do with the court's

---

* The respondents were tried twice. Both trials were tape recorded, as was the prelimiary hearing. Citations indicate either preliminary hearing (P), trial number (T1 or T2), tape number, and counter number from a General Electric, Model 3-5157B, tape recorder, with approximately 650 counters per side.

comment to defense counsel, before the jury, "Any time I open a can of worms, counselor, you can go fishing." [T1/9/340; T1/11/306]. The court ruled its own remark could be cured with an admonition to the jury, commenting it was "injecting a little humor". [T1/11/370, 405]

Third: The most serious inaccuracies of the petition concern the events leading up to the mistrial declaration [petition 3-4]. It is the case that the state made a motion in limine to prevent defense counsel eliciting the opinion of either of the two State Police witnesses as to whether they believed Ms. Lewis. [T1/17/52].

It is emphatically not true that defense counsel "was not sure he would solicit Officer Garcia's opinion" [petition 4]. Defense counsel informed the trial court he was not intending to ask Officer Garcia any such question. [T1/17/71]. Defense counsel argued his basis for asking the question of Lieutenant Medina: that Lt. Medina's disbelief was already in the police report of a state's witness who had been questioned extensively on that report; that defense counsel planned to qualify Lt. Medina as an expert in law enforcement; and that Lt. Medina's testimony on that point would directly contradict Ms. Lewis' direct testimony that the State Police had told her they did not have jurisdiction to investigate her claim of someone impersonating a State Police Officer. [P/4/210; T1/17/75-95].

The trial court stated it was granting the motion in limine. [T1/17/110]. Defense counsel renewed his request to be able to impeach Ms. Lewis' prior testimony. [Id.:100]. The trial court stated, "That's allowed, but he is not entitled to have an opinion."[Id.:110]. After commenting that if the defendants were found guilty, Lt. Medina ought to

be fired [Id.:130], the trial court instructed defense counsel," you will advise him [Lt. Medina]..." [Id.:144].

At this juncture, the state had already rested its case in chief [T1/6/369]. The court considered adjourning for the day, but allowed the defense to begin its case, commenting, "You're the one that wants to get this show on the road." [T1/7/150]. The first defense witness was Teena Cherryhomes, whose testimony concerned the physical aspects of Mr. Molinar's car. [Id.:167-270]

The second defense witness was Officer Sam Garcia. The fourth question on re-direct examination of this witness was, "So, since she never came to you with a complaint, you did nothing to dissuade her from proceeding with a complaint".[T1/8/20]. Officer Garcia's response was, "No sir, not dissuading her from filing a complaint. What I was telling her, she --- to be real frank with you, I didn't believe her, or what she was saying."[Id.:21].

At this point, the trial court interrupted the witness:

> [Court] That did it. Now I don't really care for your opinions. And that wasn't necessary. And you've just --- you've just caused a mistrial. And I don't like the way you and your partner are acting in this case. I want you to know that from me. Is that clear?
>
> [Witness] That's very ---
>
> [Court] I don't --- now get out!

Following this exchange, the court told defense counsel that it had instructed him to tell both officers not to give their opinions, declared a mistrial and banged his gavel. [Id.:30]

Defense counsel asked for a jury recess. [T1/18/40] After the jury left, the court asked the state to move for a mistrial. [Id.:44]. The prosecutor declined to move for a mistrial, both then and at a later opportunity, when the prosecutor commented that he recognized the

defense could move for a mistrial based on the exchange [before the jury] between the court and defense counsel. [Id.:118].

Defense counsel made a clear record that he did not intend to elicit the remark from the witness [Id.:65, 73], and that he had never received information from that witness that he didn't believe Ms. Lewis [Id.:138]. Counsel also reaffirmed for the record that the court's sua sponte mistrial declaration was being made over defense objection [Id.:183].

Fourth: The petition filed with this Court alleges that the question defense counsel asked Officer Garcia was "not necessary to counter Ms. Lewis' testimony" [petition at 4]. This is factually inaccurate. Ms. Lewis had testified that she went to Lt. Medina and Officer Garcia with allegations of Mr. Molinar impersonating a State Police Officer and harassing her, and that they told her it was not in their jurisdiction and they didn't want to step on anyone's toes [P/4/210; T1/3/594; T1/5/198]. Ms. Lewis had also testified she did not file any formal complaint then or throughout the alleged harassment. [T1/3/620; T1/6/280]. The question asked by defense counsel was whether Officer Garcia had done anything to dissuade Ms. Lewis from filing a complaint.

Fifth: The petition's statement of the case omits significant differences between the first trial and the second. These omissions bear not only on the weight to be accorded the New Mexico Supreme Court's decision, but also upon whether the "Question presented" in the petition could even dispose of this case.

The state presented two witnesses at the second trial who were not at the first: one, the state had neglected to subpoena [Officer Mounce:

T2/15/298], and on the other [Tibercio Carrasco], the state had not obtained service [T2/20/306; RP204]. These two witnesses were brought specifically to attack details of Mr. Molinar's defense.

Also, at the first trial, at the conclusion of the state's case in chief, the prosecutor asked to play for the jury a tape recording of Ms. Lewis sobbing agreement to a police officer's leading questions, while she was an inpatient at a mental hospital. [T1/15/205] After listening to the tape, the court excluded it as cumulative; as more prejudicial than probative; and specifically ruling it was not admissible to show "state of mind". [T1/16/92]. The court also commented that the tape might have been admissible if it had been brought while Ms. Lewis was on the stand, so that the defense could cross-examine her on it. [Id.]

At the second trial, the prosecution again moved the introduction of the tape -- again after Ms. Lewis had left the stand -- and this time the court allowed it to be played for the jury. [T2/7/268]. In response to defense counsel's repeated request for a ruling as to the legal basis for admitting the tape, the court finally told defense counsel "you could say that [it's 'state of mind']". [Id.:325]. Defense counsel made record of objections that the tape was made at a time too far removed from the events; that it was not subject to cross-examination; and that the jury would be unable to make any assessment of Ms. Lewis' demeanor. [Id.:329]. The court overruled all objections. [Id.:333].

The court told defense counsel he could cross-examine Ms. Lewis on the tape after it was played for the jury [Id.:289], but then refused to call her back to the stand that day. [Id.:570] Instead, the prosecution was allowed to call two more witnesses, then the jury was sent home for the night. [Id.; T2/8/358].

SUMMARY OF REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The question presented by the petition in this case, even as phrased, turns on the correctness of a finding of "manifest necessity", which is always a highly fact-specific determination. Therefore, any review of this case would be highly unlikely to be of guidance to other courts, since the facts would never be identical.

The decision of the New Mexico Supreme Court involves its exercise of its original jurisdiction over inferior courts within New Mexico, because the decision was made on a writ of certiorari to the New Mexico Court of Appeals. N.M. Const., Art.VI, § 3. The decision also intrinsically involves the New Mexico Supreme Court's evaluation of the conduct of a district court, as part of its pre-eminent powers to regulate the practice of law within the state, and to have superintending control over all inferior courts. Therefore, the decision concerns procedure within those courts.

The factual inaccuracies and omissions of the petition significantly undermine all arguments advanced in the petition for granting of certiorari. The dissent in the New Mexico Court of Appeals, and the majority of the New Mexico Supreme Court, disagree with the facts advanced in the petition to this Court.

Further, this case would not necessarily be disposed of by the granting of certiorari on the issue as presented in the petition. Because of the New Mexico Supreme Court's decision as to double jeopardy, it did not address other issues preserved and briefed before it.

ARGUMENT AGAINST GRANTING CERTIORARI

1. FACTUAL INNACURACIES IN THE PETITION'S STATEMENT OF THE CASE, AND IN THE QUESTION PRESENTED, ELIMINATE ALL ARGUMENTS ADVANCED FOR GRANTING THE PETITION.

The question presented in the petition alleges that the court's ruling was other than it was. The petition states the judge had ruled "this testimony [the witness' opinion] was inadmissible". The actual ruling of the trial judge was that defense counsel should not ask a different witness his opinion, and that if that witness' opinion came in, there would be a mistrial. [T1/17/110, 144]

The petition goes on to further misstate the facts of the hearing on the motion in limine, and the declaration of the mistrial. It was only after the court had declared a mistrial sua sponte that it told defense counsel it expected him to admonish both witnesses. [T1/18/30].

The question actually asked by defense counsel was proper re-direct. The witness' answer was unresponsive and unexpected. The trial court refused to consider alternatives to a mistrial, even though the prosecutor would not request a mistrial, and the defense objected. [T1/18/45, 75, 183]

For these reasons, Respondents would rephrase the "Question presented" to read as follows:

> Does double jeopardy bar retrial of the defendants after the trial judge sua sponte declared a mistrial, without considering other curative alternatives, when a police officer testifying for the defense stated that he did not believe the alleged rape victim, after the trial judge had ruled a different witness could not give an opinion on the alleged victim's credibility, and warned that if that other witness' opinion came in there would be a mistrial.

The New Mexico Supreme Court's treatment of the case reflects conformance with this Court's choice, as stated in Gori v. U.S., 367 U.S. 364, 369 (1961), not to become preoccupied with the hypothetical

supposition that a trial judge could abuse his discretion and declare a mistrial to allow the prosecution a second chance after presenting a weak case. However, in the instant case, the state's case was significantly strengthened against Mr. Molinar at the second trial. See e.g. U.S. v. Kin Ping Cheung, 485 F.2d 689 (5th Cir. 1973) (no retrial after mistrial when prosecution used it to tactical advantage).

Rather, the New Mexico Supreme Court precisely held the state to its "heavy burden" in examining a situation in which mistrial was declared over the defendants' objection. Arizona v. Washington, 434 U.S. 497 (1978). The petition concedes the trial court in the instant case made no consideration of alternatives [petition 5]. When this is combined with the trial judge misquoting his own ruling and instruction to justify the mistrial declaration; with the New Mexico Supreme Court's finding that there was no misconduct by defense counsel; and with the prosecutor's refusal to state that he thought the inadvertant remark was so prejudicial as to require a mistrial; there is no support for the state's having carried its "heavy burden".

2. THE DECISION OF THE NEW MEXICO SUPREME COURT IS TOO FACT SPECIFIC TO OFFER GUIDANCE TO OTHER COURTS

As the petition acknowledges [at 6], this Court has declined to provide any mechanical test for determining whether "manifest necessity" exists. United States v. Jorn, 400 U.S. 470, 480 (1971). The fact-specific nature of "manifest necessity" determinations has been a reality recognized since the phrase was used in United States v. Perez, 9 Wheat. 579 (1824). While certain sets of recurring circumstances,

such as the inability of the jury to reach a verdict, have been held to equal "manifest necessity" on many occasions, the instant case presents no such commonly recurring circumstance nor bright line. The balancing of how prejudicial an unexpected remark is to the state's case, and how effectively it may be cured by an admonition to the jury or some curative measure other than a mistrial, must vary infitiely with the strength of the prosecution's case, the credibility of the witness who makes the remark, and a myriad of other factors.

The petition argues for this Court's consideration as a means of giving guidance to trial courts as to how they should make a record of considering alternatives [petition at 11]. However, this Court's decision in United States v. Jorn to avoid a mechanical rule also militates against any absolute rule as to "how much" record of consideration of alternatives is enough.

The facts of the present case are not of the kind which will recurr as an inevitable part of the judicial process, such as a "hung jury". Rather, the correctness of the New Mexico Supreme Court's decision still turns on an evaluation of peculiar combinations of fact-bound circumstances. Therefore the decision's import, even within New Mexico, is largely limited to the parties involved. For thess reasons, also, Respondents respectfully urge this Court to deny the petition for certiorari.

3. THE NEW MEXICO SUPREME COURT'S DECISION INVOLVES ITS ORIGINAL JURISDICTION OVER INFERIOR COURTS WITHIN THE STATE AND SHOULD NOT BE DISTURBED

The New Mexico Constitution, Article VI, § 3, specifies:

> The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

The part of the New Mexico Supreme Court's original jurisdiction for which the power to issue writs of certiorari is "necessary or proper" is its superintending control over all inferior courts. Although the opinions of the New Mexico Supreme Court apply the Double Jeopardy prohibition of the U.S. Constitution's Vth Amendment, they also necessarily involved an evaluation of the conduct of the inferior courts of the state. To the extent that this was procedural guidance within the state, in the exercise of the original jurisdiction of the New Mexico Supreme Court, the decision is not purely appropriate for review by this Court on the basis alleged in the petition.

CONCLUSION

For all the reasons stated above, Respondents respectfully request this Court refuse to grant the petition for certiorari filed in this cause, and leave undistrubed the decision of the New Mexico Supreme Court. U.S. Const., Amends. V, XIV.

Respectfully submitted,

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Counsel for Respondents

I hereby certify that I served a copy of this Brief in Opposition on Charles H. Rennick, Counsel of Record for the State of New Mexico in this matter, by hand-delivery, on the 14th day of May, 1990.

Peter B. Rowes